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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-943

INTERNATIONAL AIR INDUSTRIES, INC. and VEBCO, INC.,

Petitioners,

versus

AMERICAN EXCELSIOR COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
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OCTOBER TERM, 1975

No. 75-943

INTERNATIONAL AIR INDUSTRIES, INC. and VEBCO, INC.,
Petitioners,
versus
AMERICAN EXCELSIOR COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the District Court (Appendix B of Petition) is not reported. The opinion of the Court of Appeals for the Fifth Circuit (Appendix A of Petition) is reported in 517 F.2d 714 (5th Cir. 1975) and Trade Reg. Rep. ¶60,447.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

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QUESTIONS PRESENTED

I. Whether controverted evidence of "predatory intent" established primary-line damage in a price discrimination claim under the Robinson-Patman Act as a matter of law where petitioners did not show that respondent's prices were below either its average variable cost or its short-run, profit maximizing price.

II. Whether a trial court's rulings on evidence and instructions to the jury deprived petitioners of a fair and impartial trial where the court's actions were within the scope of its sound discretion and did not result in a miscarriage of justice or affect the substantial rights of the parties.

III. Whether evidence that respondent acted as a reasonable and prudent person in granting lower prices to meet the low price of petitioners was sufficient to establish the statutory affirmative defense under the Robinson-Patman Act which exempts from liability price discriminators who in good faith meet competition.

STATUTES INVOLVED

The pertinent provisions of the Clayton Act, as amended by the Robinson-Patman Act, and of the Sherman Act are set forth in the Petition (Appendix C).

STATEMENT OF THE CASE

Vebco, Inc. (Vebco) and International Air Industries, Inc. (International), petitioners, sued

American Excelsior Company, now known as AMXCO, Inc. (AMXCO), respondent, requesting damages and injunctive relief for price discrimination under the Robinson-Patman Act and for attempted monopoly under the Sherman Act. AMXCO denied the charges and affirmatively pleaded all statutory defenses to the allegations of price discrimination. After a lengthy trial, a jury composed of seven men and women returned a verdict for defendant. The jury was composed of seven persons because, at the outset of the trial, an alternate juror was selected. Since he sat through the entire trial, the parties agreed that he could participate in the final deliberations.

The Fifth Circuit affirmed the jury verdict for AMXCO. In connection with petitioners' Robinson-Patman Act claim, the Court of Appeals determined that the case involved only an issue of primary line damage to competition. The facts did not raise an issue of secondary line damage. As to the claim, the Fifth Circuit held that the trial court had properly refused to direct a verdict for petitioners at the close of respondent's evidence. Since respondent had controverted all major parts of petitioners' evidence, a directed verdict was not appropriate because reasonable minds could differ about liability. Therefore, petitioners' case had not been established as a matter of law. The Fifth Circuit also overruled all other points of error listed by petitioners.

As the Fifth Circuit noted, the facts in this case were hotly contested. A comparison of the statement of facts by the Fifth Circuit and by petitioners indicates that they are still hotly contested. Petitioners do not,

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however, limit their "Statement of Facts" to a recitation of the facts; they also include opinions and arguments. For example, throughout their "Statement of Facts", petitioners complain of the trial court's evidence rulings and argue against the validity of those rulings. Utilizing this technique, petitioners devote 40 percent of their brief (21 of 52 pages) to their "Statement of Facts." The purpose of the lengthy recitation is not apparently to give a concise statement of the case as required by Rule 23(1)(e) of the Rules of the Supreme Court. Instead, the purpose seems to be to present an argument that the decisions below were simply wrong. Although the same arguments raised in the factual statement were thoroughly briefed for the Fifth Circuit, who rejected them, respondent deems it necessary to reply to them again under Rule 40(3) of the Rules of the Supreme Court to correct the inaccuracies and omissions in petitioners' "Statement of Facts." For purposes of reference, respondent will use the same subheadings used by petitioners.

I. Vebco

Vebco, Inc. is a New Mexico corporation. It is qualified to do business in the State of Texas and has its principal place of business in El Paso, Texas. (R. 132) Vernon E. Britt and his son, Paul E. Britt, are the principal shareholders of the company. Vebco is primarily a distributor of heating and air conditioning equipment although it does manufacture some products, including hand-made evaporative cooler pads. (R. 188-89) It sells its pads primarily in Arizona, New Mexico and West Texas. (R. 455)

II. International

International Air Industries, Inc. is a Texas corporation with its principal place of business in El Paso, Texas. International was incorporated in 1969 for the purpose of manufacturing evaporative cooler pads and evaporative cooler covers for sale by Vebco. The original owners of International were Vernon E. Britt, Paul E. Britt and three other former employees of AMXCO. (R. 141-206). In 1970 the Britts, through Vebco, acquired control of the company. (R. 205-206).

Vebco and International, although separate corporate entities, operated as one business. When International was in operation, all of its pads were sold by Vebco. Subsequently, Vebco took over the manufacturing operation. (R. 152-56). International ceased operations in January, 1972, but has not been dissolved.

III. AMXCO

AMXCO, Inc. is a corporation with its principal place of business in Arlington, Texas. (R. 25). It is a subsidiary of the Texstar Corporation. It maintains a branch office in El Paso, Texas. It manufactures machine-made evaporative cooler pads which it sells throughout the southwestern and far western parts of the United States.

The first evaporative cooler pads in the United States were manufactured by hand by a group of companies called Western Wood Excelsior and Western Aspen Excelsior. American Excelsior Company

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(AMXCO) did not manufacture pads until it merged with these two companies in the early 1950's. Shortly thereafter, AMXCO devised a method of manufacturing pads by machine. (R. 109-10). The innovation allowed AMXCO to realize substantial savings in time, transportation and storage because the machine-made pad could be made more efficiently than the hand-made pad. It also was not as bulky as the hand-made pad. (R. 376-77). In the late 1950's, AMXCO purchased two other companies connected with one of its former employees. (R. 110-12). AMXCO's pad manufacturing operation has not been affected by mergers or acquisitions since 1960. It has, however, participated in merger or acquisition negotiations twice since 1960.

The first set of negotiations occurred at the instigation of Vebco and International. They were concerned about competition from another machine-made pad manufacturer, Southwest Industries, Inc. (Southwest). (R. 390-91). They suggested that AMXCO acquire either both or one of their companies. (R. 392). Although the negotiations lasted for almost a year and involved several definite proposals, they did not result in an acquisition. (R. 392-417). The second set of negotiations was with Southwest. This second set was not of the "same type" as the first set. Rather, the negotiations between AMXCO and Southwest lasted less than two days. The proposals were not concrete and the meetings were nebulous. (R. 116-17).

AMXCO did not consummate either of these potential "deals" because of sound business reasons. For example, acquisition of Vebco would have created too

many conflicts with other distributors. (R. 407). The decisions were made in the face of a clear understanding that Vebco and Southwest would continue to be strong competitive forces in the manufacture of evaporative cooler pads. It was obvious, however, that AMXCO could not curtail competition in the industry by acquisition or otherwise because barriers to entry were and still are so low. For instance, the book value of International, which manufactured pads for the El Paso market beginning in 1969, was only $22,000. (R. 409). Consequently, even though AMXCO is still the world's largest producer of cooler pads, its share of various pad markets has steadily decreased. (R. 491).

Before 1969, AMXCO was competing with several small regional pad manufacturers. (R. 299). After 1969, Southwest became a major national competitor. Another major competitor is presently entering the national market, too. (Tr., Vol. II 491-92). AMXCO has always had competition; it is now more intense than it ever has been in the past.

IV. The relevant market

Evaporative cooler pads comprised the relevant product market in this case. Cooler pads are used in evaporative air conditioners or coolers. They are made of aspen wood shavings, called excelsior, which is then covered with a crinoline cloth. (R. 133-34). Although the pads manufactured by the parties in this case are interchangeable, AMXCO's production of a machine-made pad allowed it to realize substantial savings in time, transportation and storage unavailable to Vebco and International. (R. 376-78).

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The national geographic market for cooler pads is the southwestern and far western parts of the United States, where the humidity is relatively low and the temperature is warm. (R. 380). The relevant geographic market in this case was disputed. Petitioners have consistently claimed that it was the national market. They presented facts that they say substantiate their claim. Respondent continues to claim that the relevant market was a submarket encompassing the cities of El Paso and Las Cruces. The facts supported its position. The real competition between the parties took place in El Paso and Las Cruces.

Although petitioners and respondent vigorously disagreed on the dates when competition really began for purposes of this suit, petitioners urged at trial that it began for all practical purposes in 1969 when AMXCO refused to drop ship its pads for Vebco into other states and thereby forced petitioners to manufacture their own pads. It was clear from the testimony, however, that the refusal to drop ship was merely an attempt by AMXCO to treat all distributors equally. (R. 386-87). The controversy over drop shipments, in reality, was the pretext that Vebco employed to cancel outstanding orders with AMXCO and to begin manufacturing a hand made pad through the International operation. (R. 382-83).

By manufacturing a hand-made pad, petitioners in fact established the true area of their competition with AMXCO and other pad manufacturers. Robert Case, President of Southwest Industries, a third competing pad manufacturing company, explained why:

Question: How do you end up defining what might happen to be a local market?

Answer: I would define it — me personally, I would define the local market as being the area that you can service adequately and satisfactorily with the product that you're manufacturing.

Now, in the case of hand-made cooler pads, I would say that they are more apt to be confined to a local market than machine-made, because of your packaging, and the density that you can bring your pads down to.

Question: What's packaging and density have to do with it?

Answer: Well, if you get down to six pounds per cubic foot density, you get a cheaper freight rate.

The wisdom of Case's observation was soon brought home to petitioners, who in the next year arranged to purchase the majority of their evaporative cooler pads from respondent. (R. 262). Consequently, in 1970, respondent and petitioners more nearly assumed roles of manufacturer-supplier and buyer-distributor than competitors. In fact, AMXCO manufactured a specially packaged pad for petitioners. The other El Paso distributors, who considered Vebco a competitor, sold pads in a market area limited to Southern New Mexico and West Texas, an area whose trade center is El Paso and Las Cruces. (Tr., Vol. II 455).

In 1971, petitioners established beyond doubt the area of their effective competition when they chose the El Paso/Las Cruces trade area or submarket as the

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battleground for a price war with their other competitors, AMXCO and Southwest Industries. At the beginning of the year, they initiated a price cut throughout the submarket. (R. 264-66). Although they contended the price was dropped to meet competition, the competitive price was never verified. (R. 263). Not only did petitioners limit their price cut to El Paso and Las Cruces; they also limited it to the retail discount stores in the two cities. (R. 273). AMXCO followed petitioners' pattern. (R. 231-32). Consequently, as a result of their own acts, petitioners clearly illustrated that the El Paso/Las Cruces trade area was the relevant submarket in the case.

V. The interrelations of the parties and the alleged antitrust violations

For many years, Vebco was a distributor of AMXCO's cooler pads. (R. 135). By using AMXCO's pads, Vebco developed a thriving business. (R. 160). One reason that Vebco's business thrived was because AMXCO had favored Vebco in its freight policy. It paid Vebco's freight costs to customers in New Mexico and Arizona but did not pay the freight costs of distributors in New Mexico or Arizona to customers in Las Cruces or El Paso. (R. 385-87). When AMXCO adopted a uniform policy and ceased paying freight costs for all of its distributors, Vebco decided to set up its own manufacturing plant, International. (R. 190).

From the beginning, Vebco and International operated as one entity and competed with AMXCO as a manufacturer. (R. 382-83). In order to help its other El Paso distributors compete with Vebco, AMXCO

reinstated its policy of paying freight costs for those distributors to customers in New Mexico and Arizona. (Tr., Vol. III 940). AMXCO continued to sell its pads through distributors in 1969 although Vebco made a significant entrance into the market as a manufacturer and caused AMXCO to lose business. (R. 388). Later that year, Southwest entered the market.

After Southwest entered the market, Vebco contacted AMXCO about a possible acquisition. Although the negotiations regarding an acquisition fell through, the parties entered into an arrangement whereby, during 1970, AMXCO would sell a specially packaged pad to Vebco for sale under Vebco's label and Vebco would sell pumps and parts to AMXCO. (R. 400-401). At the request of Vebco's owners who held an interest in International, AMXCO loaned Vebco $20,000 to enable it to buy out the other owners of International, who were involved in Southwest, and to pay off International's outstanding indebtedness, which was owed to Southwest. (R. 397-99). The 1970 arrangement was a satisfactory one for both parties. Vebco received a better or lower price for AMXCO's pads than did any other El Paso distributor in 1970. (R. 418). In 1971, the parties decided to implement an arrangement similar to the one in 1970. (R. 417).

Implementation did not, however, occur. Instead, a price war began in El Paso and Las Cruces. It was initiated by Vebco, who in 1971 owned, controlled and operated International. Vebco cut its prices on cooler pads in El Paso and Las Cruces by five percent in January and February of 1971. (R. 263). Although Vebco said it believed that it was meeting a price in the El Paso and Las Cruces market, it did not attempt to

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verify the price. (R. 263-66; 365-66). By lowering the price, Vebco created price differences to its customers in El Paso and Las Cruces, because it did not uniformly lower the price. (R. 272). At the time Vebco made the price cut, it did not have orders on pads from K-Mart, which in the past had dealt with L. R. Paschich, a distributor for Defendant. (R. 270-71). After the cut, K-Mart gave its order to Vebco. (R. 267-69).

By taking the K-Mart business from Paschich on the basis of price, Vebco cornered the entire retail discount market in El Paso and Las Cruces. (R. 302-303). While doing so, Vebco also attempted to work a subterfuge on AMXCO, from whom it had agreed to purchase five railroad cars of pads. (R. 219). By March, 1971, Vebco had not requested delivery of the last three cars. It is now apparent that Vebco had decided to delay the order of the last three cars as long as possible so that AMXCO would believe that its pads would be sold in quantity in El Paso and Las Cruces. If Vebco could have delayed long enough, they could have cornered the discount trade in El Paso and Las Cruces without a fight and could then have cancelled the order. AMXCO would thus have been precluded from entering the market at all in 1971. AMXCO, however, finally realized this and, consequently, in March of 1971 requested that Vebco purchase the remaining three cars. Frank Turner, an employee for AMXCO, explained what happened:

> He [Britt] didn't say "yes" and didn't say "no". He just didn't give us an affirmative answer, but he didn't say "no", either. And we asked him a dozen times if he was going to place an

> order for the other three cars, and on March 1 this is virtually too late too — it's so late in the year, it's late to manufacture and produce. (R. 644).

When Turner and another of AMXCO's employees, June Morris, left Britt's office, they felt from his response that they were not going to get any further orders. (R. 328-29). They also knew that Paschich had lost the K-Mart business to Vebco and that their distributors could no longer compete with Vebco. (R. 327). Under the circumstances, AMXCO decided it had no choice but to approach the retail trade on a direct basis. (R. 329).

Since AMXCO had not sold directly to the retail discount trade in El Paso and Las Cruces, it did not know the price structure in the area. Consequently, it had difficulty setting a price low enough to meet the competition. AMXCO's first attempt did not get any business. In response to questions on cross-examination, Frank Turner, AMXCO's El Paso Manager, explained the process as follows:

> Q What did you do sir?
> A We decided we had no choice but to approach the retail trade on a direct basis.
> Q Did you do that?
> A Yes, we did.
> . . .
> Q Okay. What price did you decide you were going to sell these retail customers?
> A We decided we would offer them a discount of 25 percent.

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Q Okay. Did you have any factual information at that time which would indicate that this was the price that Vebco was selling at?

A Well, we thought we had some indicators. Number One, the Fort Bliss bid in the fall — November of the previous year for Vebco and Southwest Industries and ourselves had all bid on this thing. Southwest Industries' bid and Vebco's and ours were, I think, the Number One pad were within pennies. So this indicated that pricing could be very competitive for the coming season.

Q But you had never sold any customers in El Paso other than the Fort Bliss business for the price that you offered to Fort Bliss, had you?

A No, we hadn't.

Q Fine. All right. Were there some other indications that you had, sir?

A The indication that we had had from Mr. Paschich that he had lost the business at 15 off, and further we had information that Southwest Industries had quoted the Gibson chain at, I believe, less 15, less 10 and less 5. These indicators kind of said to us that this was about the point where —

. . .

Q Okay. Did you have any information that was about Southwest Industries which really is not involved in this lawsuit. Did you have any other information that would indicate that Vebco was selling at 25 off?

A Southwest Industries is around quoting these same people, also, as well as Vebco.

Q Yes, sir. But that's not my question.

A I see.

Q I asked you if you had any information that Vebco was selling at 25 off when you made that offer.

A Just that Vebco had indicated earlier in one of these exhibits here that they would be competitive with Southwest Industries anywhere.

Q Okay.

A So we felt this was about the figure we should go at, that this would be competitive with either one of them.

Q Okay. Now, as far as any of the other stores in El Paso, did you know that Southwest Industries had called — was making offers to these stores that you called on?

A Yes, I knew that they were making offers.

. . .

Q And you made calls on all the discount trade, is that correct?

A We did.

Q And you offered a price of 25 off?

A That's right.

Q All right sir. Did you get any business at 25 off?

A We never sold a cooler pad at 25 off.

Q Okay. Who did you personally call on to offer 25 off?

A I believe our first call, Mr. Morris and I called on Joe Walker at K-Mart.

Q Okay. Who else did you call?

A I believe we called on a Walgreen's store over there at Grant City.

Q Okay. Did you require any quantity purchase when you made these calls at 25 off?

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A No. We felt that this class of trade that you have to — should approach them pretty much the same level, because they were all competing with each other. And I can't see that you could really draw a line between two different prospective accounts.

Q When you called on them, did you ask them who was supplying them?

A No, we asked if our price was competitive.

Q And did you ask for any documentation about the price?

A It's not common, and we didn't know this then, but —

. . .

Q Fine. Okay, when you found out you were not going to get — or that you had not received any business at a discount of 25 percent off, what action did you take then, sir?

A Well, we went back at a later date and we quoted a price of 25 and 10.

Q Now, did you know that when you quoted the 25 off that Vebco had met that price?

A Nobody told us so. We asked then whether we won — if our price was competitive, and nobody — we got no response. And neither did we sell anything.

. . .

Q You didn't have any information really, factual information as to what the price was, is that correct?

A When we went back a second time?

Q Yes.

A I had had a report from our salesman, Tom Webb, who had made a call on Surplus

City on North Mesa, a man by the name of Cruz Sanchez, and his report was that Mr. Sanchez told him that he was buying cooler pads from Vebco at less 25, less 15, less 10, which all added up to about 50 percent.

Q But he also reported to you that he didn't try to get any substantiation of that, didn't he?

A I recall in his report he said that he — said to Mr. Sanchez that possibly we would meet that price, and that Mr. Sanchez just didn't react at all. (R. 329-332).

It is interesting to note that, when Sanchez testified, he admitted that he often "fished" for a price. He would tell one salesman that a prior salesman had given a lower quote when in fact the prior salesman had not. In this way, Sanchez would bait the later salesman to lower his quote below that actually given by the prior one. (Tr., Vol. II 363-64). It is also interesting to note that Sanchez and the Vebco owners were friends and that Sanchez once bought excelsior aspen rolls from AMXCO for Vebco at Vebco's request. (Tr., Vol. II 367). Finally, it is crucial to note that, during this entire period, AMXCO never lowered its prices below costs. It only reduced its prices so long as it could make a reasonable profit. (R. 339-42).

In setting prices, AMXCO also had to consider that it was supplying only one item in a product line to the discount trade. This placed AMXCO at a disadvantage. L. R. Paschich explained why:

Q Was American Excelsior competing with Vebco for the chain store business in 1971?

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A Yes.

Q Was American Excelsior primarily trying to sell pads to the chain store business?

A Yes.

Q Was Vebco selling pads and other things?

A Right.

Q Would American Excelsior be at a disadvantage in trying to sell only pads to the chain store business instead of selling pads, and pumps and floats and valves?

A I would say they would be at a disadvantage if they tried to sell only pads.

Q Why would they be at a disadvantage?

A The chain stores like to place all their business with one account. It's a very seasonable business, and it had to be handled quickly and service — lots of service, five o'clock delivery, Saturday deliveries, in order to keep up with the rush of business on — in the cooler pad business and the cooler supply business. First hot day, everybody wants their cooler started, and by golly, they need the merchandise, and this demands a lot of service. So it is to the chain store's advantage if they deal with just one man on everything they sell in that line. (Tr., Vol. II 470-71).

Consequently, while Vebco was furnishing an entire product line to the retail discount trade, AMXCO was furnishing only one item in the line, cooler pads. Since this trade "likes to do business at one stop," AMXCO was at a further disadvantage in price competition. (R. 268).

During the price war in 1971, one particular employee of AMXCO, Carl Gillespie, wrote several memoranda that contained language which petitioners believe showed obviously bad intent on the part of AMXCO. From Gillespie's own testimony, however, it is clear that his comments were always made as suggestions and did not express the company policy of AMXCO. In fact, none of his memoranda were ever written soon enough to affect company pricing changes which were in every instance made before he wrote the memoranda. (Tr., Vol. III 1043-1106).

After the price war ended in the spring of 1971, AMXCO learned of a wood supply that Vebco had contracted to buy but had apparently been unable to take. A series of interoffice memoranda were circulated about this wood supply. The memoranda show that, after AMXCO learned of the wood supply, it investigated the possibilities of buying the wood for itself but decided not to. It never purchased the wood.

One of the memoranda dated November 10, 1971, shows that an employee of AMXCO, Dale Gasch, learned that the contractor, who had cut wood for petitioners, was unable to get them to take it. (R. 468-69). The memorandum does not say that AMXCO sought out the information or initiated the contact. In fact, it did not. Gasch was interested in the wood because he needed to relieve the pressure on AMXCO's wood suppliers in Cedar City and Englewood due to a critical wood shortage. He recognized petitioners' priority rights in the wood. Consequently, before he could make a purchase arrangement with the

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supplier, he would require that the supplier contact petitioners and give them an opportunity to take the supply. He also wanted the supplier to document such action in light of the pending litigation with petitioners. Certainly, on the basis of this memorandum, no unlawful intent is expressed. The purpose for the investigation, clearly stated, was to attempt to relieve AMXCO's own supply shortages.

A second memorandum illustrates that the contact was to relieve shortages and to check for a future source of supply. (R. 470). Another employee of AMXCO observed that the supplier was satisfied with his arrangement with petitioners and that the matter should be dropped because any further attempt would be a waste of time. Although Gasch wrote one other memorandum urging that the matter be further investigated to relieve pressure on other suppliers and also to deprive Vebco of a wood source, the matter was dropped and the wood was never purchased. (R. 471; Tr., Vol. III 1111).

These facts, some of which were properly excluded, formed the basis for the jury verdict in favor of respondent AMXCO. There was substantial evidence from which a jury could conclude that AMXCO did not violate the antitrust laws.

ARGUMENT

Petitioners give three basic reasons under Rule 19(1)(b) of the Rules of the Supreme Court for granting the writ in this case: (1) the Fifth Circuit's decision conflicts with decisions by other courts of appeals; (2)

the Fifth Circuit has decided a federal question in a way in conflict with applicable decisions of the Supreme Court; and (3) the Fifth Circuit has sanctioned such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervisions. Respondent is convinced that none of these reasons applies in this case. It is also convinced that some of petitioners' arguments for granting certiorari are grounded in a misunderstanding of the clear wording and import of the Fifth Circuit's decision. A correct reading of the decision will indicate that it is not subject to question. The purpose of the argument will be first to show that the Fifth Circuit's decision is right and then to show that no valid reason exists for granting the writ in this case.

I. The decision below is clearly correct.

Petitioners' argument in the Fifth Circuit was that the trial court should have directed a verdict for them on their Robinson-Patman Act claim at the close of all the testimony. The burden on petitioners as movants in such a circumstance was heavy. The trial court could have granted their motion only if, considering all the evidence and all reasonable inferences that could be drawn from the evidence in a light most favorable to the case of the non-movant AMXCO, reasonable men could not have arrived at a verdict in favor of AMXCO. *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc.) Petitioners' burden therefore was to show to the trial court that they had proved every element of their Robinson-Patman Act claim as a matter of law. The Fifth Circuit correctly held that they did not meet their burden.

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The contested element of the Robinson-Patman Act claim in this case was whether petitioners had proved as a matter of law under Section 2(a) of the Act that the effect ofAMXCO's price differences "may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition." The Fifth Circuit correctly determined that the contested element of the claim also involved only the primary-line competition between petitioners and respondent as cooler pad manufacturers. 517 F.2d at 720-21 n. 11 (A. 11a). There was absolutely no showing that AMXCO's actions had the requisite adverse effects on secondary-line competition or on Vebco as a distributor for AMXCO. Prior to 1971, when Vebco was a distributor for AMXCO, it admitted that it was competitive with AMXCO's other El Paso distributors. (R. 275). Prior to 1971, the other distributors were also competitive. In fact, one distributor, Robert Paschich, testified that AMXCO tried to protect it in competition with Vebco when Vebco began manufacturing pads through International. (R. 307). In the end, Paschich could not compete as a distributor with Vebco, which was a manufacturer. (R. 305). AMXCO thus had to compete directly. (R. 306-07). Consequently, the case involved only an analysis of the effects of primary-line competition in the market place.

In an attempt to meet the requirement of showing as a matter of law an adverse effect on competition, petitioners claimed that there was considerable diversion of business from Vebco to AMXCO in 1971 and that Vebco suffered a reduction in its profit margin because it had to compete with AMXCO. The Fifth Cir-

cuit held that "a showing of more than competitive pricing and a shift of customers" was necessary to meet the statutory requirements as a matter of law. 517 F.2d at 722-23 (A. 13a). Such a further showing was particularly necessary in this case. Indeed, the facts showed that there was no potential danger (1) that competition would be lessened, (2) that a monopoly would tend to be created or (3) that competition would be injured, destroyed or prevented.

As to the first proscribed effect on competition under the Robinson-Patman Act, the lessening of competition, it is clear that primary-line competition has increased. Today it is vigorous with more competitors in the market than ever before. Petitioners, for example, were merely distributors of evaporative cooler pads in 1968, the year that the First Amended Complaint alleged that antitrust violations began. (R. 19; 139). In 1969, they began to manufacture pads. (R. 141-43). There were thus two manufacturers competing in the El Paso area in that year. (R. 145). In 1970, Southwest Industries became the third pad manufacturer to compete in the El Paso area. (Tr., Vol. II 435). All three have competed in the area since. Further, after its inception, Southwest established itself as a "national" competitor in the cooler pad market in the United States which is the southwestern part of the country. (R. 299). Finally, another "national" pad manufacturer is making its weight felt and becoming a fourth competitor in an already thriving market. (Tr., Vol. II 491-92).

As to the second proscribed effect, tendency to create a monopoly, it is clear from the facts cited above that

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there is now a tendency toward proliferation in the market, not concentration or monopoly. The evaporative cooler pad market has never been more competitive. AMXCO is not monopolizing the market; it is in fact losing ground in the market. Its national sales have been declining since 1969. (R. 439-40). Petitioners and Southwest Industries have made significant inroads into AMXCO's percentage share of the El Paso/Las Cruces market. (R. 441-43, 491; Df. Ex. DO). In fact, in the year that AMXCO allegedly made a concerted effort to harm competition, 1971, the percentage share of the market for both Vebco and Southwest increased. (R. 441-43, 491; Df. Ex. DO). Finally, in the midst of this thriving competition, Vebco's total sales, gross profits and net profits on all products have increased every year since 1968. (R. 438, 490; Df. Ex. DL). This evidence consequently created at least a fact issue in regard to whether there was a tendency to create a monopoly. For example, the Fifth Circuit has held that where competing sellers experience an increase in absolute sales volume which compares favorably with the volume of an alleged price discriminator, competitive injury is unlikely. *Borden Co. v. FTC*, 381 F.2d 175, 179 (5th Cir. 1967). Under the circumstances, the proscribed effect certainly was not shown as a matter of law.

Finally, as to the third proscribed effect, injury or destruction or prevention of competition, it is also clear from the above facts that competition in the manufacture and sale of cooler pads is more intense now than ever before. The facts also illustrate that real or substantial injury has not been visited upon any of AMXCO's competitors. For example, since they began

making pads, petitioners have expanded their operation every year. They have continued to improve their process and have always been able to meet their requirements. (R. 244-47). This is not a condition in which one normally expects to see an injured or destroyed company. Further, in 1971, when AMXCO allegedly set out to destroy petitioners, the two companies evenly split the pad sales to the discount trade in the relevant market. (R. 361, 464; Pl. Ex. 19). If AMXCO had not entered the market, Vebco would thus have cornered that trade. The Fifth Circuit was certainly right, because of the facts, to require petitioners to prove much more than competitive pricing and a shift of customers to establish as a matter of law the proscribed statutory effects.

In light of the evidence in the case, the Fifth Circuit determined that the only way petitioners could prove the statutory effects as a matter of law was through evidence of certain types of predatory conduct. In fact, after comparing the authorities with the evidence in this case, the Fifth Circuit concluded that the requisite damage to competition was not present and consequently that "Vebco necessarily rests its case upon a 'predatory intent' argument." 517 F.2d at 722 n. 14 (A. 14a). Petitioners asserted to the Fifth Circuit that predatory intent was shown as a matter of law by the submission into evidence of various letters and memoranda written by AMXCO's employees. At trial, AMXCO's employees explained the import and purpose of these documents. The Fifth Circuit therefore correctly concluded that, "even under the unwieldy 'double inference test,' Vebco cannot prevail on appeal; the record indicates that the jury would have

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been justified in finding an absence of 'predatory intent,' or, upon finding such intent, in failing to draw the permissible inference of damage to competition." 517 F.2d at 723 (A. 15a). In particular, the Fifth Circuit noted that many of the alleged "predatory" memoranda contained only recommendations, not directions for action. It noted that a directed verdict could not be based on a mere showing of "what AMXCO might have done." 517 F.2d at 723 (A. 16a).

To determine what AMXCO actually did, the Fifth Circuit examined AMXCO's prices to see if they were predatory. It determined that "predatory" meant that "AMXCO must have at least sacrificed present revenues for the purpose of driving Vebco out of the market with the hope of recouping the losses through subsequent higher prices." 517 F.2d at 723 (A. 16a). The Fifth Circuit then proceeded to analyze prices and costs based upon suggestions propounded in Areeda and Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975). In the article, Professors Areeda and Turner forcefully argue that the "basic substantive issues raised by the Robinson-Patman Act's concern with primary-line injury to competition and by the Sherman Act's concern with predatory pricing are identical." *Id.* at 727. They explain that if "the Sherman Act is properly interpreted to permit a monopolist to discriminate in price so long as his lower price equals or exceeds marginal costs, such discrimination is a fortiori permissible for firms with lesser degrees of market power, and the Robinson-Patman Act should be interpreted no differently in primary-line cases . . ." *Id.* at 727. In the next paragraph of their article

they note that the statutory language and compelling legislative history of the Act do not dictate otherwise. *Id.* at 727. Their final conclusion at page 728 provides wisdom directly applicable to this case:

> But even though determinations of cost may remain a substantial problem, it seems clear to us that in this instance it is unavoidable. In the vast majority of situations, discriminatory price-cutting — insofar as primary-line competition is concerned — will be profitable to the firm concerned and procompetitive. Thus any such simple test as "diversion" or "deteriorating price structure" would be wrong most of the time. We should not pay that price for administrative simplicity.

The economic analysis of these two noted authorities in the field of antitrust law is unquestionably sound. By defining and determining the various "costs" a firm has, they correctly suggest that it can then be determined if the firm "is seeking to maximize profits or minimize losses, since a firm which seeks to do so is normally responding to acceptable economic incentives and is thus not engaging in predatory behavior." *Id.* at 701. A firm maximizes profits or minimizes losses by regulating its output. It determines if its output is a profit-maximizing one by noting if any increase in output would add more to costs than to revenues. It determines if its output is a loss-minimizing one by noting if any decrease in output would reduce revenues more than costs. *Id.* at 701. It then follows that a firm can determine whether to

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decrease or increase output by looking to the incremental cost of making and selling the last unit, which is its marginal cost. It further follows that, if a firm sets its output at a level where marginal cost exceeds price, part or all of the output is sold at an out-of-pocket loss. *Id.* at 712. It finally follows that, if a firm produces at such an out-of-pocket loss, its motives go beyond profit maximization or loss minimization. As a result of this analysis, Professors Areeda and Turner observe at page 712 that

> marginal-cost pricing by a monopolist should be tolerated even though losses could be minimized or profits increased at a lower output and higher price, for the reasons, among others, that marginal-cost pricing leads to a proper resource allocation and is consistent with competition on the merits. Neither reason obtains when the monopolist prices below marginal cost. The monopolist is not only incurring private losses but wasting social resources when marginal costs exceed the value of what is produced. And pricing below marginal cost greatly increases the possibility that rivalry will be extinguished or prevented for reasons unrelated to the efficiency of the monopolist. Accordingly, a monopolist pricing below marginal cost should be presumed to have engaged in a predatory or exclusionary practice.

Professors Areeda and Turner give an exhaustive treatment of the concept of predatory pricing in their article. The above overview is only an explanation of

the part of the article most pertinent to this case in order to delineate the primary justifications for requiring below-cost pricing before predatory conduct is found. If such a requirement is not mandated, then pricing behavior that leads to a proper resource allocation and is consistent with competition on the merits might be thwarted in the courtroom. As a result, the mere threat of litigation could then "materially deter legitimate, competitive pricing." *Id.* at 699. The very purpose of the antitrust laws would consequently be negated. In this case, the Fifth Circuit understood this very problem and stated that "our goal in applying the Robinson-Patman Act is to maintain active competition — including price rivalry — among members of the business community." 517 F.2d at 721 (A. 11a). In accordance with a suggestion in the article, the Fifth Circuit determined that, in a predatory pricing analysis, a firm's average variable cost would be effectively substituted for marginal cost. "Thus, a firm's pricing behavior can be considered anti-competitive [as a matter of law] when it sells at a price below its average variable costs." 517 F.2d at 724 (A. 18a). The Fifth Circuit stated one exception to the rule which again is consistent with the analysis of Professors Areeda and Turner. If there are significant barriers to entry into the relevant market, damage to competition will be inferred as a matter of law when a firm is charging below a short-run, profit-maximizing price in the market. Such a price is above average variable price. *Id.* at 705. Even if a firm's price is below the short-run profit-maximizing level, the Fifth Circuit concluded that it would "not infer damage to competition if the firm's price discrimination has beneficial effects or insignificant effects in the competitive market." 517 F.2d at 724 (A. 19a).

Using these analytical standards, the Fifth Circuit examined the cost and pricing structure in the market in this case. At the outset, it should be noted that petitioners did not challenge in their Petition the accuracy of the examination, which illustrated that AMXCO, at its lowest market price, was selling its cooler pads at a level far "above even its average cost." 517 F.2d at 725 (A. 21a). As Professors Areeda and Turner correctly observe, average cost is always higher than average variable cost. *Id.* at 700-701. Consequently, AMXCO's prices were clearly above average variable cost. The second step of the analysis then required the Fifth Circuit to examine barriers to entry into the market. It found that they were "virtually non-existent." 517 F.2d at 725 (A. 21a). It concluded that the "condition of the market and AMXCO's financial data therefore indicate that the price rivalry in the cooler pad market could reasonably be considered pro-competitive and the judge properly denied Vebco's motion." 517 F.2d at 725 (A. 21a).

The Fifth Circuit also decided that the jury could reasonably have found that AMXCO established the statutory defense of discriminating in price to meet competition in good faith. The facts certainly support this conclusion because of the highly competitive market and the propensity of buyers to "fish" for better discounts. The Fifth Circuit found that the evidence would support a conclusion that AMXCO knew facts which would lead a reasonable and prudent person "to believe that the granting of the lower prices would in fact meet the equally low price of a competitor." *Callaway Mills Co. v. FTC*, 362 F.2d 435, 443-44 (5th Cir. 1966). Under the circumstances, if AMXCO

happened to beat not meet the lower price, it still would be entitled to the defense. Professors Areeda and Turner agree and write at pages 725 and 726 of their article the following:

> If, as we have contended, a monopolist should be permitted to make a general price reduction so long as his price equals or exceeds marginal cost, we are unable to see a persuasive case for prohibiting selective price-cutting to retain or obtain particular customers. Selective price-cutting cannot possibly be more harmful to small competitors than a general price reduction to the same level. And since any additional sale at a price at or above marginal cost does not decrease shortun net returns, the necessary element of predation is missing.

The remainder of petitioners' arguments to the Fifth Circuit involved the evidence rulings and legal instructions of the trial court. As to the evidence rulings, the Fifth Circuit correctly determined that they did not constitute an abuse of the court's discretion and, at any rate, did not affect the substantial rights of the parties. For example, although petitioners protested the exclusion of the wood supply memoranda, the Court of Appeals found that they would have been only a "minor piece of evidence, unlikely to have changed the result." 517 F.2d at 727 (A. 25a). It also correctly found that the omission from the evidence of the exact amount of AMXCO's prices outside El Paso and Las Cruces was proper, especially when AMXCO's price levels were substantially above marginal cost and it

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obviously did not need to support the El Paso and Las Cruces submarket with aid from other markets. 517 F.2d at 728 (A. 26a-27a). Finally, the Fifth Circuit concluded that the instructions to the jury were, at most, harmless error.

This description of the opinion below has been lengthy. Length was necessary, however, to emphasize the merit and sound analysis of the Fifth Circuit. The opinion is well-reasoned and grounded in well-accepted economic principles. It furthers the goals and objectives of the antitrust laws, which are premised on the assumption that the "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Railway v. United States*, 356 U.S. 1, 4-5 (1958). As its main achievement, the opinion recognizes that price discrimination is "a neutral phenomenon in economics, and 'may be evidence of either effectively monopolistic or effectively competitive forces, depending on its setting.' " Rowe, *Price Discrimination under the Robinson-Patman Act* 25 (1962). Its analysis allows future courts to determine more reasonably, by isolating the cost issue, which forces are at work in the market place. Monopolistic forces can consequently be checked while competitive ones remain unfettered. The Fifth Circuit performed its task admirably in this case; its opinion should not be disturbed.

II. The decision below does not conflict with applicable decisions of the Supreme Court or other Courts of Appeal.

Of the seven "conflict" reasons that petitioners give for granting the writ, four involve alleged conflicts between the decision below and decisions by the Supreme Court. Three involve alleged conflicts between the decision below and decisions of other Courts of Appeal. Petitioners' reasons will be discussed in the order used in the Petition.

A. *The Fifth Circuit correctly held that pricing below certain well-defined costs must be proved before the requisite likelihood of harm to competition can be established as a matter of law in a Robinson-Patman Act case.*

Petitioners' first reason for granting the writ is an argument that the Fifth Circuit enunciated a predatory pricing standard that conflicts with the Supreme Court's rulings in *Utah Pie Company v. Continental Baking Company*, 386 U.S. 685 (1967); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960); and *Moore v. Mead's Fine Bread Company*, 348 U.S. 115 (1954). In support of their argument, petitioners write at page 30 of their Petition the following:

> Based upon the Court of Appeals same reasoning vis-a-vis below cost sales, the court held it was unnecessary to construe the "may be" language of the Robinson-Patman Act and cited Areeda and Turner, *Predatory Practices under Section 2 of the Sherman Act*, 88 Harv. L.

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> Rev. 697, 727 (1975). In other words the Court of Appeals has ruled that unless there is below cost selling the "incipiency" sections can have no force or effect.

This summary of the case holding is wrong, but the argument does not fail for that reason alone. It also fails because a correct interpretation of the case will reveal that it is not in conflict with any of the decisions listed above.

When the Fifth Circuit decided that it was not necessary to construe the "may be" language of the Act in this case, it did so simply because it determined that AMXCO's activities could not "reasonably be viewed as a lessening of competition." 517 F.2d at 720 n. 10 (A. 10a). It was not holding that the "incipiency" sections of the Act can have no force or effect unless there is below cost selling. Indeed, under no conceivable interpretation can the Fifth Circuit's opinion be construed to so hold. Rather, the Court of Appeals held that the "incipiency" sections of the Act are not proved as a *matter of law* unless

> either (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.

517 F.2d at 724 (A. 19a). The decision is unquestionably clear in this regard.

An understanding of this holding also provides the distinction between this case and *Utah Pie*. In fact, in a footnote the Fifth Circuit purposefully distinguished the two cases:

> Much of what we say here should be relevant to the requisite elements of a prima facie Robinson-Patman case. Indeed, in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696, n. 12, 702, n. 14, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967) the Supreme Court indicated that price below "cost" is perhaps, a necessary element of a prima facie case. However, because the Court repeatedly referred to "deteriorating price structure," the opinion may hold that it is not necessary to show a price below marginal cost in order to make out a prima facie case. *To the extent that the opinion stands for the latter proposition, we limit our discussion to the elements necessary to sustain a motion for directed verdict.* (Emphasis added.)

517 F.2d at 724 n. 30 (A. 19a). The distinction is thus between the proof requirements of establishing a factual basis for a claim and establishing a claim as a matter of law. The Fifth Circuit does not say that petitioners failed to establish a factual basis for their claim or, in other words, that they failed to establish a prima facie case. If they did, however, then the case was properly given to the jury in light of the facts already discussed. There were conflicting inferences arising from the facts. Merely because one set of facts are labeled prima facie proof does not mean that that

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set should "be treated as conclusive on the fact finder so as to deprive him of his responsibility to choose among disputed inferences." *Wright v. Rockefeller*, 376 U.S. 52, 57 (1964). This is true "whether the conflicting inferences are drawn from evidence offered by the plaintiff or by the defendant or both." 376 U.S. at 57.

The holding in *Utah Pie* is completely consistent with this view. The plaintiff received a jury verdict. The Tenth Circuit reversed on the ground that the requisite harm to competition had not been proved. The Supreme Court reversed the Tenth Circuit on the ground that, from the evidence, the "jury was entitled to conclude" that the requisite harm had been proved. 386 U.S. at 703. The plaintiff had thus made out a prima facie case and was entitled to go to the jury. A reading of the facts in the case illustrates that *Utah Pie* stands for, if anything, a predisposition by the Supreme Court to allow jury consideration of close or questionable cases. That very thing was done in this case and petitioners lost. *Utah Pie* therefore gives them no comfort.

Besides *Utah Pie*, petitioners assert that the Fifth Circuit's opinion conflicts with *FTC v. Anheuser-Busch, Inc.*, *supra*, and *Moore v. Mead's Fine Bread Company*, *supra*. Since both the cases involve price discrimination in various submarkets, petitioners apparently cite them in support of their argument that they should have been allowed to show AMXCO's exact prices outside of El Paso and Las Cruces. Petitioners' argument, however, is not valid and the trial court correctly excluded the prices. Before respondent discusses the two cases cited above, it will

give the reasons justifying the trial court's exclusion of the evidence.

In the first place, evidence was admitted that AMXCO charged prices in El Paso and Las Cruces that were different than those charged in other areas. Portions of a stipulation were admitted, for example, which informed the jury the following:

> Defendant AMXCO has charged its customers in the El Paso-Las Cruces trade area different prices, contemporaneously in time, for the same grade and quality of evaporative cooler pad.
>
> Defendant AMXCO has charged its customers in the El Paso-Las Cruces trade area and its customers in other Southwestern states different prices, contemporaneously in time, for the same grade and quality of evaporative cooler pad. (R. 68).

Further, testimony was admitted which informed the jury that AMXCO was charging lower prices for its pads in El Paso and Las Cruces than it was in other areas. Paul Britt, one of petitioners' officers, testified, for example, that he learned AMXCO's prices in El Paso and Las Cruces were lower than its prices in other markets. (R. 231-32). June Morris, one of AMXCO's employees, testified that AMXCO's prices were lower in El Paso and Las Cruces than in other areas. (R. 337-38). Another one of AMXCO's officers, Carl Gillespie, also testified that the price competition between the parties was localized in El Paso and Las

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Cruces. (R. 430). Since evidence establishing the geographic price differences was already before the jury, the further offer of proof was merely cumulative in nature. "A trial court has wide discretion in a situation of that kind." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 230 (1940). This is especially true in a complex case of long duration like the present one. Moreover, some restraint on the introduction of evidence must be imposed to insure that the jury is not unnecessarily confused. *Id.* at 230-31. See also Fed. R. Civ. P. 61; 11 Wright and Miller, *Federal Practice and Procedure*, §2885 (1973). In effect, it is clear that, from the evidence in the record, the jury was fully informed of AMXCO's geographic price differences and did not need information of specific prices in other markets to evaluate adequately the charges of petitioners.

In the second place, failure to admit the evidence on prices was not, by itself, reversible error. The mere fact that a competitor may set prices in one competitive market lower than its prices in other markets is not alone evidence of predatory misconduct which may have adverse effects on competition. In *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961), on remand from the Supreme Court's decision in *FTC v. Anheuser-Busch, Inc.*, *supra*, the Seventh Circuit observed that, absent a showing that a competitor has aid from its other markets when lowering its price in one, the competitor is not necessarily violating the Robinson-Patman Act by the reduction in price. In that case, Anheuser-Busch was the predominant beer manufacturer in the United States. In response to competition in St. Louis, it lowered its prices in that market while maintaining them at higher levels in

other markets. The Court found that Anheuser-Busch had not violated the law and observed:

> Turning now to the situation at bar, we find that, there being no showing that AB had aid from its other markets and despite a decrease in its national sales, AB forthrightly met its robust competition in the St. Louis market by a multiple-pronged program, which included but was not limited to a two-step reduction in its price to exactly meet that of its competitors. The record affirmatively shows that AB used restraint in its competition efforts. Its conduct was in conformity with the principal that competition is the decisive force in the market place.

289 F.2d at 842. In light of *Anheuser-Busch*, since no evidence was introduced in the present case which even implied that respondent had aid from its other markets when it lowered its prices in El Paso and Las Cruces, the trial court certainly did not commit reversible error by excluding some evidence of specific prices outside El Paso and Las Cruces.

From this discussion, it is clear that the exclusion of the prices in other markets was justified. Further, the Fifth Circuit's holding that the exclusion was justified does not conflict with the Supreme Court's decisions in *Anheuser-Busch* or *Mead's Fine Bread*. In fact, the decision below does not conflict in any way with the two cases. *Anheuser-Busch*, for example, dealt solely with whether there had been a price discrimination. 363 U.S. at 549. The Supreme Court specifically limited

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its holding to that one question and refused to discuss facts relevant to other matters which might be put in issue in a Robinson-Patman Act proceeding, such as the likelihood of injury to competition. 363 U.S. at 552. Under the circumstances, a conflict between the decision below and *Anheuser-Busch* is impossible to find.

Neither does the decision below conflict with the Supreme Court's ruling in *Mead's Fine Bread.* It involved a question of whether discriminatory prices in a local, intrastate market underwritten by higher prices in interstate markets violated the jurisdictional provisions of the Robinson-Patman and Clayton Acts relating to interstate commerce. The Supreme Court answered affirmatively and noted that "the treasury used to finance" the local warfare was drawn from interstate as well as local sources. The "profits made in interstate activities would underwrite the losses of local price-cutting campaigns." 348 U.S. at 119. Since the decision below did not involve a jurisdictional question relating to commerce and since there was no evidence of any kind admitted or offered for admission in the trial court indicating that AMXCO underwrote losses in El Paso and Las Cruces by profits made elsewhere, no conceivable conflict exists between the decision below and *Mead's Fine Bread.*

Before leaving the discussion under this heading, respondent must also speak to petitioners' fifth reason for granting the writ, which is so related to the first reason as to require a combined response. Basically, petitioners argue that, by showing injury to themselves as a single competitor, they sufficiently

proved a substantial adverse effect upon competition. Although this seems to be another argument directed to the Robinson-Patman Act issue because the Fifth Circuit specifically examined the question of injury to competition as distinguished from injury to a competitor when discussing that issue, petitioners cite a conflict with the Supreme Court opinion in *Klor's, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959), which was a Sherman Act case. Respondent therefore is uncertain of the thrust of the argument. It could go to issues involving either of the two antitrust acts.

If the argument is directed to the Sherman Act issue, it has no merit. *Klor's* involved a summary disposition of a complaint before trial. The Supreme Court held that the allegations stated a cause of action and reversed for a trial. In this case, a trial was held. Evidence was admitted as to petitioners' alleged injury. All possible instructions requested in regard to and applicable to this particular issue under the Sherman Act were given. Petitioners do not even complain of the trial court's failure to direct a verdict for them as to the Sherman Act claim. 517 F.2d at 720 n. 10 (A. 10a). No conflict is apparent. One cannot even be imagined.

If the argument is directed to the Robinson-Patman Act issue, it also has no merit. In the first place, petitioners had to establish more than some injury to themselves to prove as a matter of law that respondent's acts had a substantial adverse effect upon competition. They did not. The *Klor's* decision certainly cannot be stretched, under such circumstances, far enough to give any relief. In the second place, petitioners claim that this rule must apply

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because there was proof that no other competitor could have filled the competitive void created by their destruction. Petitioners, however, were not destroyed. There was no evidence of a competitive void. Consequently, even if petitioners are attempting to use the *Klor's* decision to draw some analogy to the facts at hand, there is nothing upon which to analogize. The argument simply fails. Therefore, no further attention will be given to petitioners' fifth reason for granting the writ.

B. The Fifth Circuit correctly held that the inferences of predatory conduct in this case, if any, were controverted by respondent so that the requisite likelihood of harm to competition was not shown as a matter of law.

Petitioners again reiterate the "examples" of predatory conduct which they believe required the trial court to hold as a matter of law that the requisite likelihood of harm to competition was proved. The failure of the Fifth Circuit to reverse on this point creates a conflict, they argue, between the decision below and the Fourth Circuit decision in *Maryland Baking Company v. FTC*, 243 F.2d 716 (4th Cir. 1957), and the Sixth Circuit decision in *E. B. Muller & Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944). This contention has no merit. In both *Maryland Baking* and *Muller* the Courts of Appeal were reviewing decisions by the Federal Trade Commission where the commission as fact finder had determined that the Robinson-Patman Act was violated. The Courts of Appeal agreed that the evidence supported the fact-finding decisions of the Commission.

In this case, the fact-finders were also given an opportunity to decide if the Robinson-Patman Act was violated. They simply reached a different conclusion than the Commission did in *Maryland Baking* and *Muller*. Any number of factual differences in the cases can explain the different results. For example, in *Muller*, both defendants sold their products below cost. 142 F.2d at 516. In this case, AMXCO did not. In effect, the distinction between a prima facie case and a case as a matter of law is again applicable to petitioners' argument. There are no conflicts and there is thus no reason to grant the writ.

C. *The Fifth Circuit correctly held that the trial court's instructions and evidence rulings as to relevant geographic market did not affect the substantial rights of the parties.*

The questions petitioners raise in regard to the relevant geographic market do not, as they contend, present a conflict with either the Supreme Court's decision in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), or the Ninth Circuit's decision in *Case-Swayne Company v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1968). In neither *Grinnell* nor *Case-Swayne* were there allegedly inconsistent jury instructions about relevant market or exclusions of evidence in regard to part of the alleged relevant market. The argument here then is simply that the trial court committed errors in its instructions and evidence rulings regarding the relevant market and that the Fifth Circuit incorrectly failed to reverse the trial court on that basis.

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In discussing petitioners' first reason for granting the writ, respondent devoted considerable attention to the evidence rulings regarding matters outside El Paso and Las Cruces. That discussion will not be duplicated. It is merely sufficient to say that the trial court had ample justification for excluding the evidence and that the exclusions did not amount to an abuse of discretion or affect the substantial rights of the parties. Therefore, the remainder of this discussion will relate to the jury instructions.

Petitioners argued to the trial court in this case that the determination of the relevant geographic market was a fact question for the jury. Generally, the question of whether a particular geographic location is the relevant market or the area of effective competition in a case under the Sherman Act is a matter of fact. *Case-Swayne Company v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1968). As in other kinds of cases, however, if no fact issue is presented, the question is a matter of law. *Thomsen v. Cayser*, 243 U.S. 66 (1916). Respondent argued that no fact issue was presented. It asserted that El Paso and Las Cruces formed the relevant geographic submarket in the case as a matter of law. When the facts are compared with the relevant authorities, the merit of respondent's argument is apparent. It is clear, for example, that a submarket can often be the relevant market for a particular case. As the Ninth Circuit observed in *Case-Swayne Co. v. Sunkist Growers, Inc., supra* at 456, "there may be a well-defined submarket which constitutes the relevant market for antitrust purposes, which . . . must correspond to the commercial realities of the industry

and is affected by price disadvantages due to transportation costs. . ." Such was the case in this instance.

The facts supporting this authority have already been set out in the "Statement of the Case" under the heading dealing with relevant market. They are that petitioners produced a hand-made pad that could not be transported or stored as efficiently or cheaply as the machine-made pad produced by respondent. Petitioners initiated the price war in this case in 1971 by dropping their prices only in El Paso and Las Cruces. Their losses, if any, were attributable to the war between them and respondent as pad manufacturers. Their losses could not, for example, be attributed to their sales before 1971 on pads manufactured by respondent since it always sold its pads to petitioners at prices equal to or lower than the prices charged to other distributors in El Paso. These and other facts outlined earlier illustrate that the area of competition between the parties was El Paso and Las Cruces. Respondent answered the price cuts in those two cities only. Its actions in response to the cuts would be the best evidence of an attempt to monopolize. Respondent therefore argued that the two cities were the relevant geographic market.

The trial court gave several instructions on the issue. In the earlier part of its charge, it told the jury that "you must determine the relevant geographic market area . . ." (R. 85). Later, it said that you "are instructed that the relevant market in this case is the so called El Paso-Las Cruces market for evaporative pads." (R. 97). Petitioners assert that the latter instruction was wrong and that the two instructions confused

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the jury. From the above analysis, however, respondent asserts that an instruction as a matter of law, if that occurred, would not have been wrong. Moreover, the Fifth Circuit addressed the question of the jury confusion directly and noted:

> While such an apparent inconsistency could mislead the jury, we do not believe, under the facts of this case, that any error committed would "affect the substantial rights of the parties." Fed. R. Civ. P. 61. As we have indicated, the judge properly excluded, for various reasons, virtually all the evidence presented which dealt with AMXCO's actions outside the El Paso area. The only evidence relevant to this point which the judge admitted was the stipulation and testimony to the effect that AMXCO charged higher prices in other areas than in El Paso. In this context, then, it is difficult to ascertain any damage to Vebco caused by the charge. If Vebco could not even prove antitrust violation in the El Paso area to the satisfaction of the jury, it is highly dubious whether an allegation of monopolizing a greater area — in the absence of evidence of actions outside of El Paso — would have improved its position. We therefore believe any error committed was harmless.

517 F.2d at 729 (R. 29a-30a). Under the circumstances, the decision below is neither incorrect or in conflict with *Grinnell* or *Case-Swayne*.

D. *The Fifth Circuit correctly held that the trial court's rulings as to evidence allegedly relevant to specific intent did not affect the substantial rights of the parties.*

Again, in petitioners' arguments relating to intent, the contention actually is not that there is any conflict but that the decision below is wrong. A quick examination of the Supreme Court decisions cited by petitioners will clearly illustrate that the decision below is not in conflict with them. The decision in *United States v. Pullman Co.*, 330 U.S. 806 (1947), will be examined first to emphasize exactly how meritless petitioners' argument is. The entire opinion can be cited because it is only two sentences:

> Per Curiam: The judgment is affirmed by an equally divided court. Mr. Justice Jackson took no part in the consideration or decision of these cases.

330 U.S. at 807. It would take more than a magician to divine a conflict in the decision below and *Pullman*. Not possessing any extraordinary powers of insight, respondent simply cannot do so.

In all but one of the other cases cited by petitioner, the issues were tried before a judge, not a jury. In such situations, evidence is rarely excluded for any reason. It is presumed that the trial court can sift through the facts and base his decision only on those that are relevant. For example, the *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), the Supreme Court observed:

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> The overruling of the exceptions taken to so much of the bill as counted upon facts occurring prior to the passage of the antitrust act, — whatever may be the view as an original question of the duty to restrict the controversy to a much narrower area than that propounded by the bill, — we think by no possibility, in the present stage of the case, can the action of the court be treated as prejudicial error justifying reversal. We say this because the court, as we shall do, *gave no weight to the testimony adduced under the averments complained of except in so far as it tended to throw light upon the acts done after the passage of the antitrust act* and the results of which it was charged were being participated in and enjoyed by the alleged combination at the time of the filing of the bill.(Emphasis added.)

221 U.S. 46-47. By elimination, only one decision is left, *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).

In *Continental Ore*, the Supreme Court did find that the trial court committed error in its "persistent exclusion" of evidence relating to time periods earlier than the one involved in the immediate controversy. 370 U.S. at 709. The Court, however, further observed that it did not mean that a trial court might not "place reasonable limits upon such evidence or set a reasonable cut-off date, evidence before which point is to be considered too remote to have sufficient probative value to justify burdening the record with it." 370 U.S. at 710. The decision below can consequently be distinguished from *Continental Ore* in two ways.

First, there was not a persistent exclusion of evidence in this case. At most, petitioners complain of the exclusion of only small parts of the testimony of three witnesses, parts of a stipulation, and four memoranda. These cannot be considered persistent when it is realized that during the trial, which lasted two weeks, almost 20 witnesses testified and over 230 exhibits were admitted. Second, in *Continental Ore*, the Supreme Court clearly did not intend to take from a trial court the discretion to control the evidence in a given case. Rule 43 of the Federal Rules of Evidence in fact provides for the exclusion of evidence when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. See *Proposed Rules of Evidence for the United States Courts*, 51 F.R.D. 315, 345 (1971). A review of the matters of which petitioners complain will illustrate that, in this case, the trial court did not abuse its discretion and did nothing to substantially affect the rights of the parties.

Petitioners first complaint in this instance, however, actually goes to the accuracy of the Fifth Circuit's opinion and not to exclusion of evidence. They argue that the Fifth Circuit incorrectly found that petitioners' share of the El Paso market increased in 1971. They say it deceased and that respondents' charts and testimony at trial to the contrary were wrong. The applicable chart, however, did show an increase and it was admitted after being fully explained by a competent witness. (R. 491; Tr., Vol. III 1117-19, 1134). When the chart was admitted, petitioners did not

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object to it. They objected only to one other chart which related to net profits. (Tr., Vol. III 1134). Under the circumstances, they certainly cannot complain of the Fifth Circuit's opinion which is supported by a chart described by competent testimony and admitted without objection.

Petitioners also complain of the exclusion of evidence regarding respondent's early development in the cooler pad business. AMXCO had mergered with or acquired several companies before 1960. (R. 109-112). The mergers and acquisitions were not systematic as petitioners claim. The trial court excluded evidence of them. It noted as it excluded the evidence that petitioners had "brought a charge . . . involving price discrimination and attempt to monopolize" (R. 297). Consequently, the trial court was well aware of the allegations under Section 2 of the Sherman Act. It then observed that it would take the evidence up with petitioners later, indicating that they could make their offer of proof outside the presence of the jury in accordance with procedural rules. Fed.R.Civ.P. 43(c). In the interim, the trial court cautioned petitioners to "stay with what the suit charges, the acts they [respondent] did starting there, I guess in '68, or '69 or '70 or '71." (R. 298).

These directions indicated a full comprehension of both the pleadings and the evidence. For example, in petitioners' First Amended Complaint the allegations of wrongful conduct center around the activities of AMXCO in 1971. (R. 25). There are no allegations of wrongful conduct before 1968. Although in one paragraph petitioners set out respondent's general

method of operation, the allegations are clearly made for historical purposes only. Further, no allegations are found anywhere in the Amended Complaint which even infer an attempt to monopolize through acquisitions occurring in the 1950's. Finally, at no time during the trial did petitioners move to amend their pleadings to raise new issues. Fed.R.Civ.P. 15. Similarly, petitioners' proof centered on the activities of AMXCO in 1971, with some attention being given to events occurring as early as 1968.

In light of the pleadings and the evidence, the trial court correctly exercised its discretion by excluding evidence of mergers with and acquisitions of AMXCO occurring 10 to 15 years before the real disputes between the parties began. The same time limitations were used in *United States v. Maryland and Virginia Milk Producers Ass'n*, 20 F.R.D. 441 (D.C. D.C. 1957), when Judge Holtzoff, a respected scholar of federal procedure, established a 10 year "cut-off" date for discovery in connection with claims of restraints of trade and attempts to monopolize under sections 1 and 2 of the Sherman Act. He further observed that most courts acknowledged that longer time frames were needed in establishing "cut-off" dates in connection with claims of unlawful mergers under Section 7 of the Clayton Act. No such claims were present, however, in this case. Judge Holtzoff's views have been approved by other scholars and judges. *Manual for Complex and Multidistrict Litigation*, §4.30.

Petitioners complain of other exclusions but time and necessity dictate a response to only one. The particular exclusion was an instruction by the trial court

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to the jury to disregard an assertion by Manuel Gomez, a witness for petitioners, that one of AMXCO's employees told Gomez that AMXCO's purpose was "to put Vebco out of business." It is clear from the record, however, that Gomez could not identify the employee who made the statement and that this was the court's reason for instructing the jury to disregard the testimony which it had already heard. Petitioners incorrectly contend that identification was not necessary. For example, in *Northern Oil Co. v. Socony Mobile Oil Co.*, 347 F.2d 81 (2nd Cir. 1965), a lower court judgment was reversed because the district judge admitted the hearsay comments of an unidentified agent of the appellant. See also *Monticello Tobacco Co. v. American Tobacco Co.*, 197 F.2d 629 (2nd Cir. 1952), *cert. denied*, 344 U.S. 875 (1952).

The reason for the requirement of identification is obvious. The statement of a party opponent is normally admitted as an exception to the hearsay rule because the party as an opponent has the full opportunity to explain the former statement on the stand. McCormick, *Evidence*, §239 at 503 (1954). If a party such as a corporation, however, does not know which of its employees or agents made the statement, it simply does not have the full opportunity to explain the statement. Under the circumstances, it is clear that the exclusions were not an abuse of discretion. Petitioners had ample opportunity with other admitted evidence to show a specific intent to attempt to monopolize. The substantial rights of the parties were therefore not affected.

E. The Fifth Circuit correctly held that damage evidence occurring during the post complaint period should have been excluded under the circumstances in this case.

Petitioners claim that the failure of the trial court to admit damage evidence occurring during the post complaint period places this case in conflict with the Seventh Circuit decision in *A. C. Becken Co. v. Gemex Corp.*, 314 F.2d 839 (7th Cir. 1963). There is no conflict, however. In *Becken*, the Seventh Circuit merely held that the plaintiff was not precluded from recovering damages for losses incurred in the post complaint period. In this case, evidence of such damage was given to the jury for consideration. The Complaint was originally filed in 1971 and petitioners' expert testified as to damage for losses incurred in 1972. (Tr., Vol. III 861). Under the circumstances, there simply is no conflict.

Also under the circumstances in this case, the trial court properly excluded the post complaint evidence. One of petitioners' principals offered to testify about petitioner's profit figures for 1973. Respondent objected, however, because it had never received the information in intelligible form. It could not, therefore, verify in any way its authenticity. The trial court concurred that the matter was "new" and that it would be unfair to allow it into evidence. (R. 901). The decision below is consequently correct.

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F. The Fifth Circuit correctly held that the evidence supported a jury finding that respondent's price differences were made in good faith to meet competition.

Petitioners claim that no jury question was created as to respondent's affirmative defense that it met competitive prices in good faith. Substantial space was devoted to the facts in regard to this issue in the "Statement of the Case." They will not be repeated. Nor will the Fifth Circuit's opinion on this issue be summarized. The facts and opinion are too clear to necessitate reiteration. The Court of Appeals was correct beyond question because, rather than reaching a decision that conflicted with the Supreme Court decision in *A. E. Stalley Mfg. Co. v. FTC*, 324 U.S. (1945), it used the very standard dictated by the latter decision. The Supreme Court held that a price discriminator could establish the good faith defense by showing "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." 324 U.S. at 760. The Fifth Circuit, using that standard, found the evidence justified a finding that competition was met in good faith. 517 F.2d at 726 (A. 22a).

III. The decision below does not sanction such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

Petitioners complain that the trial court unfairly participated in the trial of this case and consequently

prejudiced their right to an impartial trial. They believe such conduct violated their right to a jury trial and requires the Supreme Court to exercise its power of supervision. They do not, however, attempt to judge the trial court's conduct by the applicable standards. When such standards are examined, it is clear the court committed no error in the conduct of the case. The Eighth Circuit has, for example, set out such standards in *Skogen v. Dow Chemical Co.*, 375 F.2d 692, 703-04 (8th Cir. 1967):

> It has been repeatedly said that a trial judge in the Federal Courts is more than a mere moderator or arbiter. He has the obligation, along with the necessary authority, to actively preside and conduct a fair and impartial trial, to rule out improper questions, and protect witnesses from overzealous cross-examination on collateral and personal matters, particularly where such questions shed no light on the issues involved or the credibility of the witnesses
>
> . . . .
>
> Since the law places the responsibility for the trial of cases in the hands of the trial judge, a large degree of discretion is essential in the conduct of that trial within a broadly defined framework. Among other things, the trial court had discretion on the admission of evidence, the extent of examination and cross-examination of witnesses, the conduct of trial counsel, the trial court's comments upon the evidence, and the order and proper presentation of the evidence. (Citations omitted.)

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Further, the trial court, in a complex case such as this one, had an obligation to try to bring some order and coherence to the mass of evidence presented to the jury. *Rayward v. Silbermann*, 356 F.2d 611 (2nd Cir. 1966). By commenting on the evidence and controlling the examination of witnesses, the court succeeded.

Moreover, any errors that might have been committed by the trial court were rendered harmless by its admonitions regarding its own rulings. *Maryland Casualty Co. v. Coker*, 118 F.2d 43 (5th Cir. 1941). In its charge, for example, the court said:

> Again, I will tell you, you are the exclusive judges of the credibility of the witnesses and the weight to be given their testimony. I have no intention of trying to express to you nor will I express to you any idea that I may have as to credibility of a witness or what testimony should be accepted. That is your exclusive province. If you think I have, you may disregard it because I have no intention of invading your rights and obligations in that respect. (R. 80).

Under the circumstances, the trial court's participation in the conduct of the trial was not an abuse of discretion.

Petitioners also complain that the trial court incorrectly excluded some of their evidence without objection during the trial. Failure to object by a party, however, does not preclude a trial court from excluding evidence on its own motion. In fact, when the

evidence is irrelevant, unreliable, misleading, prejudicial, or incompetent, a court should exercise its discretionary power to intervene. McCormick, *Evidence* §55 at 130 (1954).

Petitioners further complain that the trial court adversely commented on some of their evidence and left the jury with the impression that it was of no consequence. For example, petitioners object to the comments made by the court in regard to the testimony on crinoline supplies. In this instance, however, the court merely wanted to insure that petitioners did not divert the jury's attention to collateral matters involving the history of crinoline's use by both parties. Still, the court admitted the crinoline evidence, stating that "it speaks for itself." (R. 314). This was certainly not a prejudicial comment on the evidence.

Petitioners also complain that the court curtailed their examination regarding the surveillance of wood supplies by competitors. In particular, petitioners asked if one of respondent's employees knew of any specific instance when petitioners checked respondent's supplies. The court correctly curtailed these questions because, if the matter became an issue, respondent would then have been required to parade other employees to the stand to testify about such surveillance. Legitimate considerations of time precluded such a diversion. Further, testimony was already before the jury from Robert Case, president of a third-party competitor, Southwest Industries, that checking the wood supplies of competitors in the pad business was "a fairly common thing to do." (Tr., Vol. II 488). Consequently, the trial court's comment on this evidence was proper and appropriate.

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Petitioners give other examples which purportedly show the trial court incorrectly commented on the evidence. An examination of only one will suffice to indicate the invalidity of all. For instance, petitioners wanted to explore the freight rate costs of respondent because respondent had testified it could ship its pads cheaper than could petitioners. This condition existed, however, not because respondent received better rates than petitioners, but because its pads were not as thick as petitioners'. Consequently, if both parties had to ship their pads in box cars of the same size, more of respondent's pads could be shipped. Disregarding this very elemental fact, petitioners wanted to investigate matters of rate costs. The court correctly precluded such an investigation, explaining that there was "nothing complicated about" the contentions on rates. (R. 420). The obvious propriety of the court's actions is as clear on the other instances enumerated by petitioners as it is in this one.

Petitioners finally complain that the trial court intervened in petitioners' presentation of chart exhibit 19. They assert that the chart was prepared so that voluminous and complicated data could be presented in understandable form. They further assert that the court disapproved of the technique. Petitioners fail to understand, however, the problems presented by the chart.

The court admitted all charts that were introduced. Respondent, however, objected to the form of some of the charts, especially exhibit 19. For example, in one column, petitioners showed undiscounted sales by respondent to retailers. Since the column failed to dis-

count the sales, a very inflated figure was presented to the jury for those sales. Petitioners admitted the column was not "germane" and was "immaterial." (R. 249-50). By using large figures, however, the column had a potentially prejudicial effect on the jury which the court realized. Further, in one of its column headings, the chart indicated that respondent was making sales to petitioners' customers, although during trial one of the most hotly contested issues surrounded the question of which customers belonged to whom. The court recognized this problem and observed that the chart was "misleading" because "that's something the jury is going to have to decide." (R. 251). Finally, exhibit 19 used questionable discount rates for petitioners' sales, which rates again had a misleading effect on damage calculations. (R. 252-53). In light of these substantial flaws, the court correctly requested the chart be presented at a later time in the trial after additional evidence was presented. It is also interesting to note that, at trial, petitioners acquiesced in the court's request and made no objections. (R. 253).

The chart was then admitted when petitioners' expert testified. They complain, however, of the court's involvement in the examination of their expert witness. It is clear, however, that the court's involvement was necessary. The expert, an accountant, was predicting the sales volume petitioners should have had and could be expected to have. On the basis of cross-examination, it was apparent that the expert had no special knowledge of the industry. He could not name the competitors in the industry. (R. 357-60). He did not know the total capacity of the market. (R. 357-58). He did not know the relationship between cooler

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sales and pad sales. (R. 358-59). For comparison, see the testimony of L. R. Paschich. (Tr. Vol. II 482). He did not consider the weather to be a material factor in his opinion. (R. 360). For comparison, see the testimony of Robert Case. (R. 312-13). Finally, he could not even vouch for his predictions. (Tr., Vol. III 828-29). In light of these shortcomings, it is doubtful that the "expert" was actually qualified to testify. Compare *Callaway Mills Company v. FTC*, 362 F.2d 435, 444 (5th Cir. 1966). Respondent vigorously objected to this testimony and asked that it be stricken. The trial court overruled respondent's objections, but did attempt to negate the prejudicial effects of unfounded opinions on the jury.

The actions by the trial court were therefore proper in this case. They did not violate petitioner's right to a trial by jury. They were certainly not of the type or nature to require the Supreme Court to exercise its power of supervision.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM DUNCAN,
COUNSEL FOR RESPONDENT

PROOF OF SERVICE

The undersigned attorney of record for respondent, AMXCO, Inc., hereby certifies as follows:

(a) that I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Brief, as hereinafter shown;

(b) that the name and address of the attorneys of record for both the adverse parties are as follows:

Kenneth L. King,
P. O. Box 2900
El Paso, Texas 79999

(c) that on this day I served three printed copies of the foregoing Brief on Kenneth L. King by depositing same in the United States post office with air mail postage prepaid, properly addressed to said attorney for petitioners at their said address.

EXECUTED this ____ day of February, 1976.

_____

COUNSEL FOR RESPONDENT